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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
42[illegible] Street, N.W.
Washington, D.C. 20536

[redacted]

FEB 24 2004

File: WAC 02 191 50721 Office: California Service Center Date:

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner is a furniture manufacturer. It seeks to employ the beneficiary permanently in the United States as a market analyst. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor, and continuing. Here, the petition's priority date is April 30, 2001. The beneficiary's salary as stated on the labor certification is $3,500.00 per month which equates to $42,000.00 per annum.

As evidence of its ability to pay the proffered wage, the petitioner, in accordance with 8 C.F.R. § 204.5(g)(2), initially submitted a letter from its chief financial officer which states that it had in excess of 100 employees and that it could pay the proffered wage of $3,500 a month.

The director did not see fit to accept this evidence relying it would seem on the language of the above regulation which says that he "may accept" such a letter from an organization's financial officer.

In a request for evidence, dated August 12, 2002, the director asked the petitioner for evidence of the ability to pay the wage in the form of copies of annual reports, federal tax returns, or audited financial statements covering the years 2000 and 2001.

In response counsel for the petitioner submitted copies of the petitioner's Internal Revenue Service (IRS) Form 1120 for Fiscal Year 2000 ending April 30, 2001, a reviewed financial statement for the year ending April 30, 2002, and Form W-3 Transmittal of Wage and Tax Statements for 2001. The petitioner's 2000 tax return indicated a taxable income of -$2,135.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel argues that the CIS failed to take depreciation, assets, accounts receivable, and other "write offs" into consideration. Counsel also submits a copy of the petitioner's Form 1120 for Fiscal Year 20001 ending April 30, 2002.

In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by both CIS and judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held that CIS properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court

specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. at 537; *see also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054. Thus, CIS will not consider the petitioner's depreciation with respect to its ability to pay the proffered wage.

The petitioner's IRS Form 1120 for Fiscal Year 2000 shows a taxable income of -$2,135. The petitioner could not have paid the proffered wage of $42,000 a year from this amount. The petitioner, however, showed net current assets for FY 2000 of $218,990, an amount sufficient to cover the proffered wage.

For fiscal year 2001, the petitioner's Form 1120 shows a taxable income of -$167,502; however, its net current assets amounted to $300,583, once again an amount sufficient to cover the proffered wage.

Accordingly, after a review of the record, particularly the petitioner's tax returns, it is concluded that the petitioner has established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained.